Supreme Court, U. S.
FILED
JUL 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-6952

JAMES JEROME ROYSTER,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

and

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Attorneys for Respondent

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented for Review	
I. WHERE THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT, ALL ELEMENTS OF THE CRIMINAL OFFENSE OF MURDER, INCLUDING AGGRAVATING CIRCUMSTANCES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED, MAY THE STATE, CONSISTENT WITH THE DUE PROCESS CLAUSE, REQUIRE THAT THE EXISTENCE OF MITIGATING CIRCUMSTANCES BE ESTABLISHED BY A MERE PREPONDERANCE TO REDUCE THE PUNISHMENT?	
II. DOES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A STATE TO PROVIDE FUNDS TO AN INDIGENT, CONVICTED OF AN OFFENSE, FOR EMPLOYMENT OF EXPERT EXAMINATION OF THE DEFENDANT FOR PURPOSES OF POST VERDICT SENTENCING WHER THE STATE STATUTE PROVIDES THAT TWO SUCH EXPERT WITNESSES SHALL BE APPOINTED TO ASSIST THE COURT IN DETERMINING THE APPROPRIATE SENTENCE?	
III. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?	
Constitutional and Statutory Provisions Involved	
Statement of the Case	3
Summary of the Argument	5
Reasons for Denying the Writ	6
Conclusion and Certificate of Service	17
Appendix	
United States Constitution	18
Ohio Constitution	19
Ohio Revised Code	23
Ohio Rules of Criminal Procedure	30
Ohio Rules of Appellate Procedure	31

CITATIONS

CASES:	Page
Furman v. Georgia (1972), 408 U.S. 238	9
Gardner v. Florida (1977), _____ U.S. _____, 97 S. Ct. 1197	12
Gregg v. Georgia (1976), 428 U.S. 153	9
Jurek v. Texas (1976), 428 U.S. 262	9
Patterson v. New York (1977), _____ U.S. _____, 97 S. Ct.	7
Proffitt v. Florida (1976), 428 U.S. 242	9
Stanislaus Roberts v. Louisianna (1976), 428 U.S. 325	9
State v. Bayless (1976), 48 Ohio St. 2d 73	13
State v. Bell (1976), 48 Ohio St. 2d 270	14
State v. Black (1976), 48 Ohio St. 2d 262	14
State v. Miller (1977), 49 Ohio St. 2d 198	16
State v. Robinson (1976), 47 Ohio St. 2d 103	7
State v. Woods (1976), 48 Ohio St. 2d 127	7
United States v. Buchanan (C.A. 7, 1975), 529 F. 2d 1148	7
Williams v. New York (1949), 337 U.S. 241	14
Woodson v. North Carolina (1976), 428 U.S. 280	9

STATUTES; MISCELLANEOUS:	
Corpus Juris Secundum, Homicide, Section 113	7
Ohio Constitution, Article IV, Section 2	15
Ohio Constitution, Article IV, Section 3	15
Ohio Revised Code, Section 2901.01	10
Ohio Revised Code, Section 2901.05	7
Ohio Revised Code, Section 2901.22	10
Ohio Revised Code, Section 2903.01	6
Ohio Revised Code, Section 2921.01	11
Ohio Revised Code, Section 2929.02	10
Ohio Revised Code, Section 2929.03	8
Ohio Revised Code, Section 2929.04	11
Ohio Revised Code, Section 2941.14	11

CITATIONS

	Page
Ohio Rules of Appellate Procedure, Rule 5	15
Ohio Rules of Criminal Procedure, Rule 32.2	12
United States Constitution, Amendment VIII	9
United States Constitution, Amendment XIV	8
Wharton's Criminal Law, Section 123	7

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-6952

JAMES JEROME ROYSTER,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION
TO THE PETITION FOR A
WRIT OF CERTIORARI

Opinions Below

The opinion below is adequately set forth in the petition and is reported in 48 Ohio St. 2d 381.

Jurisdiction

Jurisdiction is adequately set forth in the petition, being invoked under Title 28, United States Code, Section 1257(3).

Questions Presented for Review

I. WHERE THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT, ALL ELEMENTS OF THE CRIMINAL OFFENSE OF MURDER, INCLUDING AGGRAVATING CIRCUMSTANCES FOR WHICH THE DEATH PENALTY MAY BE IMPOSED, MAY THE STATE, CONSISTENT WITH THE DUE PROCESS CLAUSE, REQUIRE THAT THE EXISTENCE OF MITIGATING CIRCUMSTANCES BE ESTABLISHED BY A MERE PREPONDERANCE TO REDUCE THE PUNISHMENT?

II. DOES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A STATE TO PROVIDE FUNDS TO AN INDIGENT, CONVICTED OF AN OFFENSE, FOR EMPLOYMENT OF EXPERT EXAMINATION OF THE DEFENDANT FOR PURPOSES OF POST VERDICT SENTENCING WHERE THE STATE STATUTE PROVIDES THAT TWO SUCH EXPERT WITNESSES SHALL BE APPOINTED TO ASSIST THE COURT IN DETERMINING THE APPROPRIATE SENTENCE?

III. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Constitutional and Statutory Provisions Involved

	Page
Constitution of the United States	
Amendment VIII	17
Constitution of the United States	
Amendment XIV	17
Constitution of the State of Ohio	
Article IV, Section 2	18
Constitution of the State of Ohio	
Article IV, Section 3	20
Ohio Revised Code, Title 29	
Section 2901.22	22
Section 2903.01	23
Section 2929.02	23
Section 2929.03	24
Section 2929.04	26
Section 2941.14	28
Ohio Rules of Criminal Procedure,	
Rule 32.2	29
Ohio Rules of Appellate Procedure,	
Rule 5	30

STATEMENT OF THE CASE

Petitioner and one John Harris were indicted by the Franklin County Grand Jury, Columbus, Ohio, on a multiple count indictment charging aggravated murder, kidnapping, rape, aggravated robbery and theft. Two other individuals, Eric Maurice and Clarence Smith were indicted on all but the murder charges. After trial to a jury petitioner was found guilty. Because aggravating circumstances were also alleged and proved which provided for the death penalty, a post-verdict hearing was held pursuant to Section 2929.03, Ohio Revised Code, to determine if mitigating circumstances existed which would preclude imposition of the death penalty. No mitigating circumstances were found to exist.

Both petitioner's conviction and sentence of death were accorded full appellate review as a matter of right by both the Ohio Court of Appeals and the Ohio Supreme Court. Each level of appellate review resulted in affirmance of both the conviction and sentence by unanimous decision. A motion for re-hearing in the Ohio Supreme Court was denied.

The offense occurred on May 8, 1974. Petitioner, Harris, Smith, and Maurice abducted an emergency nurse from a parking area near a Columbus, Ohio hospital. Petitioner, armed with a sawed-off shotgun, forced the victim into the rear of her car, robbed her at gunpoint and then abducted her in her own vehicle. The assailants drove to the home of co-defendant Harris where the victim was raped numerous times then forced into the trunk of her car. The assailants argued her fate. Petitioner and Harris called for her death and over the protest of the other two assailants, drove the victim to a deserted area used as a dump. Petitioner obtained a .20 gauge shotgun and provided the weapon to Harris. While petitioner acted as a lookout, Harris shot the victim twice in the head. Petitioner then assisted Harris in covering the body with a discarded couch.

Petitioner and the others fled Columbus, Ohio, and

were driven to Philadelphia, Pennsylvania, on May 10, 1974. On the way, petitioner admitted his involvement in the murder to the driver of the car, Taylor Clark, who later testified at trial. In Philadelphia, petitioner also admitted his crimes to his cousin and aunt, both of whom testified at trial. Petitioner also admitted obtaining the death weapon and providing it to co-defendant Harris. Petitioner, Harris, Smith and Maurice were captured by the Philadelphia police.

Extensive physical evidence was presented at trial together with the testimony of several persons present during different stages of the evening. Included in that testimony was an eyewitness account of petitioner and Harris arguing with Smith and Maurice about the victim's fate. Over protest of Smith and Maurice, it was announced that the victim would be killed; petitioner armed with the shotgun, left with Harris and returned within thirty minutes. Harris announced the victim was dead.

SUMMARY OF ARGUMENT

I. Proof beyond a reasonable doubt on each element of a criminal offense satisfies the Due Process Clause of the Fourteenth Amendment. Once such proof is presented on each element and the defendant found guilty, a state may, consistent with due process, require that factors in mitigation of the penalty be demonstrated by a preponderance.

II. Where a state statute is applied with absolute equality, and precisely equal advantage to both indigent and non-indigent alike, there is no lack of equal protection of the law. Ohio Revised Code, Section 2929.03(D) providing for two court appointed experts to assist in determination of a convicted defendant's mental condition prior to sentencing, is applied to indigent and non-indigent alike.

III. Ohio statutes provide for imposition of the death penalty only for the crime of aggravated murder and only after aggravating circumstances are established beyond a reasonable doubt. The death penalty in Ohio is precluded unless no mitigating circumstances are shown. In the penalty phase of the Ohio procedure, circumstances of both the offense and the offender are taken into consideration so that the penalty is neither grossly disproportionate to the offense nor inflicted in an arbitrary or capricious manner. Full, state-wide appellate review as a matter of right insures uniform application of the law so as to not offend any provision of the Constitution of the United States.

REASONS FOR DENYING THE WRIT

I. WHILE DUE PROCESS REQUIRES THAT THE STATE PROVE EACH ELEMENT OF A CRIMINAL OFFENSE BEYOND A REASONABLE DOUBT, ONCE SUCH PROOF HAS BEEN OFFERED AND THE OFFENDER IS FOUND GUILTY, A STATE MAY REQUIRE THAT THE EXISTENCE OF MITIGATING FACTORS RELATIVE TO PUNISHMENT, BE ESTABLISHED BY A PREPONDERANCE OF EVIDENCE.

Ohio law prohibits the purposeful slaying of another with prior calculation and design or the purposeful slaying of another while committing or fleeing from specifically enumerated felony offenses: kidnapping, rape, aggravated arson, arson, aggravated robbery or robbery, aggravated burglary or burglary and escape. Section 2903.01, Ohio Revised Code. Contained in an extensive review and revision of Ohio criminal statutes, effective January 1, 1974, the offense of aggravated murder is essentially the equivalent of former first degree murder committed with premeditation or as a felony murder. In each instance, the specific intent to kill is an element of the offense.

Consistent with the revision of Ohio's penal code, aggravating circumstances may be alleged in the indictment and if proved to exist by the state beyond a reasonable doubt, the penalty for aggravated murder may be death. Section 2929.04, Ohio Revised Code.

In petitioner's case, the state alleged and proved, beyond a reasonable doubt, that petitioner purposefully murdered Jeannette Nichols with prior calculation and design and did so while petitioner was committing or fleeing from commission of kidnapping, rape and aggravated robbery. Each element of both the offense and aggravating circumstances was proven beyond a reasonable doubt.

Only after such proof on each element does the Ohio statutory framework for imposition of punishment require that mitigating circumstances be established by a preponderance to reduce the potential punishment. The Due Process Clause does not prohibit this allocation of proof. Patterson v. New York

(1977), _____ U.S. _____, 97 S. Ct.

Petitioner misapprehends the distinction between the defense of duress and the use of coercion to mitigate sentence in an otherwise capital offense. Clearly, the defense of duress or coercion is not available in a homicide prosecution. United States v. Buchanan (C.A. 7, 1975), 529 F. 2d 1148, cert. denied. 425 U.S. 950 (1976). See e.g. 40 Corpus Juris Secundum, Homicide, Section 113, p. 982, No. 5; 1 Wharton's Criminal Law, Section 123, p. 261.

While that rule has never been directly stated in Ohio, it seems to be a universally accepted principle. See State v. Woods (1976), 48 Ohio St. 2d 127, 135, n. 3, 357 N.E. 2d 1059.

Petitioner's cited case of State v. Robinson (1976), 47 Ohio St. 2d 103, 351 N.E. 2d 88, did not deal with mitigation evidence in the penalty phase of an aggravated murder offense, but rather involved an interpretation of legislative intent in a state statute (Ohio Revised Code, Section 2901.05), regarding burden of proof, presumption of innocence and affirmative defenses.

Petitioner's guilt of both the crime of homicide and aggravating circumstances was proven beyond a reasonable doubt. Requiring mitigation of the penalty to be shown by a preponderance does not offend the Constitution. Patterson v. New York, supra. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE ABSOLUTE EQUALITY OR PRECISELY EQUAL ADVANTAGE. THE OHIO STATUTES PROVIDING FOR APPOINTMENT OF TWO PSYCHIATRISTS AS COURT WITNESSES FOR ASSISTANCE IN DETERMINING THE PRESENCE OF MITIGATING CIRCUMSTANCES ARE APPLIED EVENLY TO BOTH INDIGENT AND NON-INDIGENT PERSONS ALIKE.

Under Ohio statutes once an offender has been found guilty of the crime of aggravated murder with aggravating circumstances making the death penalty possible, the trial court is required to appoint two experts to conduct a psychiatric examination. Section 2929.03(D), Ohio Revised Code. Such experts are witnesses of the court, not of the state or appellant. (Opinion below, 48 Ohio St. 2d at 390)

Before a state action can be found to violate the Equal Protection Clause of the Fourteenth Amendment, some impermissibly unequal treatment must exist. Under Section 2929.03(D), Ohio Revised Code, petitioner cannot show that, were he not indigent, he would be able to employ other psychiatrists for purposes of the mitigation hearing.

Additionally, as noted by the Ohio Supreme Court below, petitioner makes no claim that the appointed experts lacked competency or exhibited bias or prejudice. The Court below also noted that the respondent, State of Ohio, had offered to stipulate any expert findings which appellant had. (48 Ohio St. 2d 390)

No denial of equal protection of the law being demonstrated, it is respectfully submitted that the Writ of Certiorari should not issue.

III. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENT, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punishment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.

As separately discussed below, the death penalty in Ohio, as applicable to premeditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not grossly disproportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an arbitrary or capricious manner, so as to run afoul of the Eighth Amendment or violate the dictates of Furman v. Georgia (1972), 408 U.S. 238. Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion focusing on the offense and the offender.

As a constitutionally indispensible part of the process of inflicting the death penalty in the State of Ohio the circumstances, character and record of both the offense and the offender are considered in conformity with this Court's decisions last term in Gregg v. Georgia (1976), 428 U.S. 153; Proffitt v. Florida (1976), 428 U.S. 242; Jurek v. Texas (1976), 428 U.S. 262; Woodson v. North Carolina (1976), 428 U.S. 280; and Stanislaus Roberts v. Louisianna (1976), 428 U.S. 325.

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohio

to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, and as more fully set forth below, the respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment may be imposed is aggravated murder (Section 2903.01, Ohio Revised Code). The crime is analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 Ohio Revised Code), and other states.

That statute provides:

> "Sec. 2903.01(A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burlgary, or escape.
>
> "(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A), Ohio Revised Code, as follows:

> "Sec. 2901.22(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

The death penalty may be imposed only for

purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A), Ohio Revised Code, is alleged in the indictment, the penalty for aggravated murder is life imprisonment. See Section 2929.03(A) and 2941.14(B), Ohio Revised Code.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A), Ohio Revised Code, must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See Section 2941.14, Ohio Revised Code.

The aggravating circumstances are as follows:

> "The offense was the assassination of the President of the United States or a person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice-president-elect of the United States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
>
> "(2) The offense was committed for hire.
>
> "(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
>
> "(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.
>
> "(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at

jury trial, or the three judge panel if the jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida (1977), _____ U.S. _____, 97 S. Ct. 1197, Section 2929.03(D), Ohio Revised Code requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

> "(B) Report
>
> "The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which should be imposed. The offender may make a statement ot the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(D), Ohio Revised Code.

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the

existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B), Ohio Revised Code.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating circumstance is found to exist by a preponderance the death penalty is imposed. Section 2929.03(E), Ohio Revised Code.

4. Mitigating Circumstances

Section 2929.04(B), Ohio Revised Code, sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and

the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Id., at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods (1976), 48 Ohio St. 2d 127, 358 N.E. 2d 1059, set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under Section 2929.04(B)(2), Ohio Revised Code. The court, in Woods, held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced. (Id., at 135), and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Id., at 137, citing Williams v. New York (1949), 337 U.S. 241.

Likewise, in State v. Black (1976), 48 Ohio St. 2d 262, 358 N.E. 2d 551, in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be considered in light of all the circumstances. Id., at 268.

In State v. Bell (1976), 48 Ohio St. 2d 270, 358 N.E. 2d 556, in the second branch of the syllabus, the Court held that the age of the offender and prior criminal record are relevant facts to be considered in determining the

existence of mitigating circumstances under Section 2929.04(B)(2) and (3), Ohio Revised Code. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency both minority and senility being relevant. Id., at 282.

Thus, it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute and construction of the mitigating circumstances, then determines whether society's best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender.

This procedure complies with the Eighth Amendment and the dictates of this Court's decisions last term, with the Ohio procedure closely analogous to the procedure upheld in Proffit, supra., and Jurek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty-eight counties, is the court with general and subject matter jurisdiction in aggravated murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV, Section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Supreme Court, where the conviction and sentence in a capital case has been affirmed by the Court of Appeals. Article IV, Section 2(B)(2)(a)(iii), Ohio Constitution.

Thus, an aggrieved defendant in a capital case, as a matter of right, may have both his conviction and sentence reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless (1976), 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case.

> "[T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges.
> Id., at 86.

Respondent would note that the explicit quidelines contained in the statutory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller (1977), 49 Ohio St. 2d 198, N.E. 2d 419 at 204:

> "This state wide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

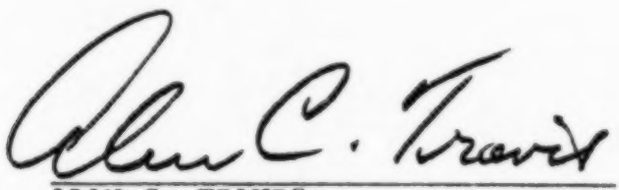
For each of the foregoing reasons, previously stated, the respondent, State of Ohio, respectfully submits that the imposition of capital punishment, under the statutory procedures, of Ohio do not offend the Eighth Amendment. We urge that the writ should be denied.

CONCLUSION

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the Writ of Certiorari should not issue in this case.

Respectfully submitted,

GEORGE C. SMITH
Prosecuting Attorney



ALAN C. TRAVIS
Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon Timothy D. Gerrity, Esquire, counsel for the petitioner, by mailing same to his office at 88 East Broad Street, Columbus, Ohio 43215; by United States Mail, postage prepaid, this 18TH day of July, 1977, and upon Myron Shwartz, Esquire, counsel for the petitioner, by mailing same to his office at 50 West Broad Street, Columbus, Ohio 43215, by United States Mail, postage prepaid, this 18TH day of July, 1977. I further certify that all parties required to be served have been served.

Respectfully submitted,

GEORGE C. SMITH
Prosecuting Attorney

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent

A P P E N D I X

UNITED STATES CONSTITUTION

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION

ARTICLE IV, SECTION 2

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessray to constitute a quorum or to render a judgment.

(B)(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;
(ii) Cases in which the death penalty has been affirmed;
(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

OHIO CONSTITUTION

ARTICLE IV, SECTION 3

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments of final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders of actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict

with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(c) Laws may be passed providing for the reporting of cases in the court of appeals.

OHIO REVISED CODE, SECTION 2901.22

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantialy lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or void a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence sufficies to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

OHIO REVISED CODE, SECTION 2903.01

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediatley after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

OHIO REVISED CODE, SECTION 2929.02

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the

extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

OHIO REVISED CODE, SECTION 2929.03

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A)of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which maybe the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section,

then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel, submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

OHIO REVISED CODE, SECTION 2929.04

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The Offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law

enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediatley after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

OHIO REVISED CODE, SECTION 2929.04

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances lested in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

Specification (or, Specification 1, or, Specification to the First Count, or, Specification 1 to the First Count). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in division (A)(1) to (7) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same).

OHIO RULES OF CRIMINAL PROCEDURE, RULE 32.2

(A) In felony cases the court shall, and in misdemeanor cases may, order a pre-sentence investigation and report before granting probation.

(B) The report of the presentence investigation shall state the defendant's prior criminal record the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present physical and mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant.

(C)(1) Except in cases of aggravated murder committed on and after January 1, 1974, the report of the presentence investigation shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.

(2) Any material disclosed to the defendant or his counsel shall also be disclosed to the prosecuting attorney.

(3) Any copies of the presentence investigation report made available to the defendant or his counsel and the prosecuting attorney shall be returned to the court, probation officer or investigator immediatley following the imposition of sentence or the granting of probation. Copies of the presentence investigation report shall not be made by the defendant, his counsel, or the prosecuting attorney.

(D) If the defendant is committed to an institution or placed under custodial care or treatment under the supervision of governmental agency, the court shall forward to the institution or custodian a copy of the report of any

presentence investigation and any mental or physical examination, together with the entry of commitment or other appropriate entry. In addition, if the defendant is committed to a penal or reformatory institution, the court shall forward a statement of the number of days confinement which the defendant is entitled by law to have credited to his minimum and maximum sentence.

OHIO RULES OF APPELLATE PROCEDURE, RULE 5

After the expiration of the thirty day period provided by Rule 4(B) for the filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave to appeal shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and a file a copy of the notice of appeal in the court of appeal. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.